IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 402

BROWN TELECASTERS, INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION,

and

TELEVISION BROADCASTERS, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brown Telecasters, Inc., petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered herein on February 16, 1961.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 289 F. 2d 868 and is printed in full in Appendix A hereto. The opinions of the Federal Communications Commission are printed at pages 137-194 and 222-228 of the Joint Appendix, nine copies of which have

been filed with this petition. The opinions of the hearing examiner are printed at pages 11-12 and 71-136 of the Joint Appendix.

JURISDICTION

The judgment of the Court of Appeals affirming a decision of the Federal Communications Commission was entered on February 16, 1961. A Petition for Rehearing or Rehearing En Banc was filed on March 3, 1961. The Petition for Rehearing En Banc was denied on June 12, 1961, and the Petition for Rehearing was denied on June 14, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 47 U.S.C. § 402(j).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission denies due process in a proceeding on mutually exclusive applications when it disregards an issue designated in its formal hearing order and grants an application in violation of its own rules, in a case in which it is conceded that the Commission:

   a. Issued a hearing order specifying with particularity that one of several competing applicants was disqualified unless and until it established good cause for a waiver of a Commission Rule violated by its application;

   b. Reversed its Examiner, held good cause had been shown for such waiver, and, on the basis of the waiver, granted the permit to the applicant in question;

   c. Denied a timely petition for rehearing, which showed that the basis for the waiver was admittedly erroneous, on the ground that, since the hearing had terminated, the permit which

had been granted on the basis of the defective waiver could be amended without prejudice to competing applicants.

2. Whether the public interest is injured where an administrative agency, having designated in a hearing order the issues required by its rules, fails to decide the matter on the basis of those designated issues.

3. Whether, on an appeal under § 402(b)(1) of the Communications Act, a showing of injury to the public interest is a prerequisite to obtaining judicial review of a procedural error by the Federal Communications Commission.

STATUTES INVOLVED

The statutory provisions are subsections (a) and (e) of Section 309 of the Communications Act of 1934, as amended, 74 Stat. 889 (1960), 47 U.S.C. § 309(a) and (e)[1] (Supp. II, 1961), Subsections (b) and (g) of Section 402 of the Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 U.S.C. § 402(b) and (g); Section 8 of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1007 and Subsection (e) of Section 10 of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009(e).

The Regulations involved are Federal Communications Commission Rules 1.140, 47 C.F.R. § 1.140; 1.141, 47 C.F.R. § 1.141; 1.311, 47 C.F.R. § 1.311; and 3.613, 47 C.F.R. § 3.613

All these provisions are printed in Appendix B hereto.

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[1] The hearing involved here was conducted prior to the 1960 amendments to the Communications Act. Prior to these amendments the provisions of present Section 309(e) were contained in then Section 309(b) 66 Stat. 715 (1952). No substantive changes were caused by the 1960 amendments which affect the issues here presented.

STATEMENT

Petitioner, Brown Telecasters, Inc. (hereinafter "Brown"), and respondent, Television Broadcasters, Inc. (hereinafter "Television Broadcasters"), each applied to the Federal Communications Commission (hereinafter "Commission") for a permit to construct a television station to operate on channel 12 in Beaumont, Texas. Two other applications, not material here, were also filed for the same channel.[2] Faced with multiple applications for the single channel involved, the Commission was required to determine (a) which of the applicants were qualified[3] and (b) which one of such qualified applicants should be awarded the permit.[4]

After reviewing the applications, the Commission issued its order designating the applications for hearing and "specifying with particularity the matters and things in issue."[5] (J.A. 6-9) Among other things, the hearing order included a specific finding that Television Broadcasters' application could not be granted

[2] The application of WDSU Broadcasting Company was dismissed without prejudice at its own request after the designation for hearing. KPBX Broadcasting Company (KPBX) participated in the hearing, was found disqualified by the Commission, and has not appealed from the Commission's decision.

[3] When an application reveals possible disqualifying factors, the Commission is unable to grant it. Instead it is required to "formally designate the application for hearing on the ground or reasons then obtaining and . . . forthwith notify the applicant and all the known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue . . ." Section 309(e) of the Communications Act of 1934, as amended, 74 Stat. 889 (1960), 47 U.S.C. § 309(e) (Supp. II, 1961).

[4] *Ibid.* And see *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945).

[5] 47 U.S.C. § 309(e), *supra*, Note 2.

in its present form, regardless of its comparative merits or demerits, because its studio proposal violated Section 3.613(a) of the Commission's rules and no showing of good cause for a waiver of the rule had been made.[6] The so-called "studio rule" is an expression of Commission policy of long standing.[7]

[6] This finding was explicit and was based upon Television Broadcasters' proposal to locate its studio five miles outside of the city limits of Beaumont. The Commission's order of designation states:

> "It Further Appearing, That Television Broadcasters, Inc. proposes to locate its main studio outside of the principal city to be served; that Section 3.613(a) of the Commission's Rules requires the main studio to be located within the principal city unless a waiver is requested and good cause shown therefore as provided by Section 3.613(b); and that no such request or showing has been made; and
>
> "It Further Appearing, That upon due consideration of the above-captioned applications, the Commission *finds* that Television Broadcasters, Inc. is * * * otherwise qualified except as to issue '3' below;" [Emphasis supplied]. [J.A. 7]

[7] This rule provides in pertinent part that "the main studio of a television broadcast station shall be located in the principal community to be served." In an opinion concerning the Rule, "*In the Matter of Amendment of § 3.606 of the Commission's Rules and Regulations*, 8 Pike & Fischer RR 216, 218 (1952), the Commission stated:

> "A basic purpose of the Commission's television assignment plan is the furnishing of local television service to individual communities. That service consists of two basic elements. First, the transmission of a television signal; second, and equally important is the availability of a local television facility to the community. The location of the main studio of a broadcast station is directly related to the manner in which a station fulfills its obligation to serve the needs and interests of the community which it is licensed to serve. . . . The accessibility of the broadcast station's main studio may well determine in large part the extent to which the station (1) can participate and be an integral part of community activities and (2) can enable members of the public to participate in live programs and present complaints or suggestions to the station."

As a result of its finding that Television Broadcasters' application did not qualify for a grant under its rules, the Commission inserted in its hearing order a threshold issue:

> "3. To determine whether good cause exists for a waiver of Section 3.613(a) of the Rules with respect to the main studio proposed by Television Broadcasters, Inc." [J.A. 8]

This issue, number 3, was directed only to Television Broadcasters who, under Section 309(e) of the Communications Act,[8] had the burden of meeting it. Television Broadcasters was not entitled to comparative consideration if it failed to meet its burden under issue number 3.

Other qualifying (or "threshold") issues, of no relevance to this petition, were set forth in the hearing order with respect to other applicants, and the standard comparative factors by which a choice would be made from those applicants which qualified were set forth in issue number 6. The hearing order concluded by notifying the parties that to be heard they must file a written appearance stating an intention to appear and "present evidence on the issues specified in this Order." (J.A. 9).

Both Brown and Television Broadcasters elected to proceed to hearing on the issues specified in the order and so notified the Commission. (R. 1741, 127) A full hearing was held, and, during its course, the only showing attempted by Television Broadcasters to justify a waiver of Rule 3.613(a) was the representation that its proposed studio was in fact the same studio which

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[8] 47 U.S.C. § 309(e) (Supp. II, 1961).

it had used in its former UHF operation.[9] (J.A. 127) The Examiner found this showing by Television Broadcasters was insufficient to support its burden of proof as to a waiver of Rule 3.613(a).[10] (J.A. 127) To complete the record, the Examiner compared the proposals of the applicants, pursuant to issue number 6, and found Brown superior. The Examiner found no preference for Television Broadcasters on any of the standard comparative factors and awarded the permit to Brown. (J.A. 128-136)

Throughout the hearing, in its findings, briefs, and in oral argument before the Commission it was insisted on behalf of Brown that Television Broadcasters had failed to meet the threshold issue as to its studio and was thus disqualified. Brown predicated its case on the assumption that the Commission's hearing order correctly set forth the studio issue as a qualifying factor for Television Broadcasters. Brown relied on the Commission's finding, specified in its hearing order, that unless and until Television Broadcasters

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[9] On November 1, 1957, long after the time when amendments to applications could be permitted without good reason, Television Broadcasters attempted to amend its application to specify a studio site within Beaumont. It was opposed by the Broadcast Bureau of the Commission and all other parties as untimely and in violation of Commission Rule 1.311, 47 C.F.R. § 1.311. The petition to amend was denied by the Examiner (J.A. 24). His decision was later upheld by the Commission (J.A. 141, 224). This was in accordance with the rules of the Commission and established precedent. *Grand Prairie Broadcasting Co.*, 13 Pike & Fischer RR 658A (1956).

[10] In the language of the Examiner: "The imagination does not need to run rampant to pose many different and valid reasons as to why an applicant, possessing a waiver for the studio location in a sometime one-station market (and that, UHF), should be required to 'prove up' such a waiver in a competitive VHF situation." (J.A. 128).

showed good cause for a waiver of the Commission's Rule 3.613(a) it would not be qualified to receive the permit.

There was no question in the parties' presentations to the Commission that Television Broadcasters had to meet its burden of showing good cause for a waiver of the rule or else be disqualified. The question was whether such good cause had been established. On this question the Commission reversed its Examiner. The Commission held that "good cause" did exist for waiving Rule 3.613(a) because: (1) The same studio for which a previous waiver had been granted was still in existence (J.A. 180), (2) The feasibility of this site had been demonstrated by its use as a UHF studio (J.A. 181), and (3) "If [the Commission] were to require compliance with the rule as a condition to a VHF grant the sums expended by the applicant in constructing the studio, pursuant to a waiver of the rule, would be largely wasted." (J.A. 181) The Commission held that "Television Broadcasters, despite urging of threshold disqualification, is entitled to comparative consideration." (J.A. 181) The Commission then gave comparative consideration and reversed the Examiner,[11] awarding the grant to Television Broadcasters. (J.A. 188-192)

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[11] The difficulty in fitting its action to the record before it is manifest from the decision itself. For example, the Commission held that Television Broadcasters:

> ". . . not only possesses experience in the overall operation of a television station, but obtained such experience while meeting the needs of the very community for which application is made. Clearly, such experience is of great significance.

Brown filed a timely petition for rehearing and reconsideration on the grounds of newly discovered evidence. (J.A. 195-199) In the pleadings that ensued it became undisputed that there was no factual basis for a single one of the reasons relied upon by the Commission for waiver of Rule 3.613(a). It is uncontroverted that the studio building was almost completely destroyed. Nothing remained of it but the concrete floor and outer walls; even the roof, all wiring, and plumbing connections had been removed. (J.A. 207) The studio was not in existence and the sums expended in building it had already been wasted. Moreover, it became apparent Television Broadcasters' proposed studio site was no longer available to it. Television Broadcasters neither owned the site nor had any right to reacquire it by option or otherwise. (J.A. 206-207) The site is presently occupied and used by a petroleum service company under a five year lease. (J.A. 207, 215-221)

As a result of Brown's petition for reconsideration and rehearing, the Commission was now clearly ap-

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and entitles Television Broadcasters to a substantial preference on this criterion." (J.A. 184)

On the same page of the decision the Commission in direct contradiction states:

> "The record shows that the station did not achieve the total number of broadcast hours proposed in its application; that only a relatively small number of local live programs were transmitted; that good balance among the various types of programs was not achieved; and that to some extent the station's proposed commercial policies were not met. If the past performance demonstrated in this record were that of a standard broadcast station or a VHF television station, it would not be such as to inspire reliance in the probability of the present proposals of the applicant being effectuated." (J.A. 184-85)

prised that there was no basis for the waiver which it had granted and upon which its award was necessarily based.[12] The studio was no longer physically in existence, nor was its site legally available. Obviously, these new and undisputed facts precluded any finding that good cause existed for the waiver. The Commission's initial finding in its hearing order, resulting in issue number 3, was thus unimpaired and Television Broadcasters was disqualified from obtaining the permit, just as Brown had insisted throughout the case.

It was now impossible for the Commission to award the permit to Television Broadcasters under the issues specified in the hearing order. It was also impossible to make the award to Television Broadcasters without violating Rule 3.613(a). To persist in favoring Television Broadcasters the Commission would have to depart both from its hearing order and its rules. A majority of the Commission did exactly this.

Ignoring its hearing order and its initial opinion that Television Broadcasters had to justify a waiver of the Rule as a condition precedent to qualifying for comparative consideration, the majority now proceeded to treat the studio issue as a comparative issue only. The studio issue was now held to have "created a compara-

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[12] In making the grant to Television Broadcasters, the Commission's initial opinion followed its rules and stated:

> "It Is Further Ordered, That the location of the main studio proposed by Television Broadcasters, Inc. being consistent with operation of the station in the public interest, a waiver of Sec. 3.613(a) of the Commission's Rules Is Granted to permit the use of the location specified in its application herein." (J.A. 192)

tive deficiency which was overcome by the over-all merit of its [Television Broadcasters] application." (J.A. 223)

Violating the hearing order and its rules by reducing the nature of the studio issue to a "comparative" rather than a "qualifying" issue was not of itself sufficient to dispose of the questions raised by Brown's petition for rehearing. Television Broadcasters' application was still in violation of Rule 3.613(a) and no basis for a waiver of that rule existed.

The fact that it was too late to amend the application of Television Broadcasters' which still proposed a studio in violation of the Commission's rules, and also known to be impossible of performance, resulted in the majority having granted an application with no studio proposal. As stated by dissenting Commissioner Lee:[13]

> "Until we know just what Television Broadcasters' studio proposal is, the question of effectuating its programming proposals must also remain unanswered. As the Court said in *Butterfield Theatres, Inc.* v. *F.C.C.* [237 F. 2d 552, 559 (D.C. Cir. 1956)] these comparative contests must turn upon concrete proposals tested through the hearing process not upon facile and untested afterthoughts." (J.A. 226-227)

The majority ignored the problem posed by the dissent as well as those posed by Brown's petition for rehearing. It rested its unusual action on the theory that the hearing was over and, therefore, the defects

[13] Commissioner Ford also dissented.

brought to light by the petition for reconsideration could have no adverse effect on the competing parties. In taking this action, the Commission did not dispute that Television Broadcasters had secured its comparative hearing status on the basis of a waiver issued for a non-existent studio. This fact was simply not dealt with. Instead, the majority stated:

> "Such amendment[14] could not have been permitted at that time [i.e. November, 1957] for to do so would have allowed TB to escape the onus of an obvious comparative weakness, and, accordingly, worked an injustice on its opponents. Now that the hearing is completed and the Commission's choice has been made, no harm can come to either petitioner or the public should TB, by appropriate process, succeed in modifying its operation in such a way as to eliminate this weakness."[15] (J.A. 224)

Of course, the majority recognized that it had no assurance that Television Broadcasters would go forward in "modifying its operation" now that its defective application was granted. To remedy this, the majority stated that its award to Television Broadcasters ". . . presupposes that any requested modification of construction permit will, as indicated in TB's opposition to the Brown petition filed on January 5,

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[14] This, of course, was precisely the type of amendment which had been attempted by Television Broadcasters on November 1, 1957, to cure its defective application and which both the Examiner and the Commission had held to be to late. See note 9, p. 7, *supra*.

[15] In short, it would be unjust to remove the issue from the hearing; but unobjectionable to ignore the issue after the hearing.

1960, specify a site within the corporate limits of Beaumont."[16] (J.A. 224)

Whatever might have been the merit of the majority's action in an *ex parte* case, it must be noted that Brown, as a competing applicant, had established its own qualifications in the hearing process. Brown had met the issues assigned to it. Brown had demonstrated, by its petition for rehearing, that the disqualifying factor as to Television Broadcasters which the Commission had "specified with particularity" in its hearing order of August 1, 1957, had not been eliminated by the hearing but still pertained. However, Brown, the only qualified applicant, was brushed aside on the ground that Television Broadcasters had justified a waiver of the studio Rule. When the waiver was shown faulty and the disqualification of the favored applicant could no longer be denied, the majority of the Commission made the award to the disqualified applicant as though Brown were no longer in the case.

On appeal to the Court of Appeals for the District of Columbia Circuit,[17] a majority of the court, while recognizing "the possibility that the Commission erred in granting the waiver" (Appendix A, p. 3a), upheld the Commission's action because any such error had "no substantial bearing on the ultimate rights of the

[16] The majority treats the matter as a modification of Television Broadcasters' "operation" because, as its opinion points out, it was too late to modify the defective application. Yet what had to be modified was the application, which the Commission had correctly found to be impossible to grant because of its studio proposal, unless good cause was shown for a waiver of Rule 3.613(a).

[17] Pursuant to Section 402(b) (1) of the Communications Act, as amended, 66 Stat. 718 (1952), 47 U.S.C. § 402(b) (1).

parties."[18] (Appendix A, p. 3a, note 3) Therefore, it appeared to a majority of the court that "appellant has not suffered such prejudice as would entitle it to relief." (Appendix A, p. 3a) The conclusion that Brown had not been sufficiently prejudiced by the Commission's actions appears to have been reached on the basis of two factors. First, the majority felt that Brown had acquiesced during the hearing in an understanding that the studio proposed in Television Broadcasters' application would be treated as "available" regardless of the actual facts.[19] Second, without discussion, the majority adopted the Commission's reclassification of the studio issue as a comparative rather than a "qualifying" issue.

Moreover, the majority's refusal to reverse on the studio issue was influenced by its view that the Commission's error did not result in injury to the public and therefore was not subject to review under Section 402(b)(1) of the Communications Act.[20] (Appendix A, pp. 4a-5a)

In the words of the majority (Appendix A, p. 5a):

> "Accordingly, we are of the view that we may not disturb the Commission's determination of the

[18] Citing the Attorney General's Manual on the Administrative Procedure Act (1947), p. 110, which in turn was quoting from *Market Street Ry.* v. *Comm.*, 324 U.S. 548, 561-62 (1945).

[19] Brown subsequently filed a Petition for Rehearing urging, inter alia, that the record did not support the court's finding that Brown had acquiesced in such an understanding. The court denied the Petition (Appendix A, pp. 10a, 11a). Even if Brown had acquiesced in such an understanding, it could not justify the invalid waiver of the Commission's rule. The Commission's waiver did not depend upon any agreement as to the availability of the site but rather on other reasons each of which are indisputably not true. See *infra*, pp. 9-10.

[20] 66 Stat. 718 (1952), 47 U.S.C. § 402(b)(1).

> 'studio issue,' since the propriety of that decision is not properly before us."

Judge Danaher, in dissent, would have reviewed the Commission's error and reversed since "the due process to which Brown was entitled was ultimately denied because of what the Commission did." (Appendix A, p. 8a) He succinctly stated the issue as follows (Appendix A, pp. 8a-9a):

> "Obviously the Commission recognized that either an applicant must comply with the rule or the Commission must find that good cause exists for non-compliance. It follows that, absent compliance or a proper finding of a waiver, the applicant is not qualified. The Commission's rules and regulations following the statute permit no other conclusion.
>
> "Here the grounds set forth by the Commission simply are not so."

Judge Danaher concluded (Appendix A, p. 10a):

> "The Commission, like any other agency, should be bound by its own rules. I think the error glares."

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT ISSUES OF FIRST IMPRESSION INVOLVING THE REQUIREMENTS OF DUE PROCESS AND JUDICIAL REVIEW IN AN ADMINISTRATIVE PROCEEDING.

Certiorari in this case will bring to the Court for the first time the question of whether due process is denied the parties where an administrative agency renders a decision without regard for one of the issues which was designated for hearing as required by the rules of the agency. The court below has ruled that

while the agency may have erred in failing to consider an issue which was designated and heard, the error was not prejudicial to the competing parties.

By permitting an administrative agency to adjudicate a matter without regard to all of the issues it has designated, the Court's holding is contrary to established principles of administrative procedure and in direct conflict with the ruling of the Fifth Circuit in *Trunkline Gas Co.* v. *Federal Power Commission*, 247 F. 2d 159 (5th Cir. 1957). In the circumstances of this case it would also permit an unwarranted exception to the ruling of this Court in *Service* v. *Dulles*, 354 U.S. 363 (1957) that an agency must follow its rules.

The case also presents an important question concerning the scope of judicial review under the Communications Act of 1934[21] which calls for the exercise of this Court's supervision. The Court of Appeals has determined that the Commission's error caused no injury to the public interest and was therefore not subject to appellate review under Section 402(b)(1) of the Communications Act.[22] The limitation which this holding of the court has placed upon the scope of review available to a party under Section 402(b)(1) of the Act makes this a case of first impression which will seriously affect the appellate rights of all persons whose applications are denied by the Federal Communications Commission.

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[21] 48 Stat. 1064, as amended, 47 U.S.C. § 151 et seq.

[22] 66 Stat. 718 (1952), 47 U.S.C. § 402(b)(1).

II. THE COMMISSION'S COURSE OF ACTION RAISES IMPORTANT QUESTIONS OF DUE PROCESS CALLING FOR THE GRANT OF A WRIT OF CERTIORARI.

A. The Commission's Disregard of the Studio Issue Seriously and Adversely Affected the Right of the Parties to a Fair Hearing.

To reach its decision in the present case, the Federal Communications Commission not only retrospectively eliminated a designated issue but, in so doing, it also violated its own rules. In upholding this action, the court below has ruled that an agency may, in its decision, ignore an issue upon which a hearing was held without either abusing the administrative process or prejudicing the rights of the parties or the public.

There is no question that Television Broadcasters' proposal violated the Commission rules and that the Commission properly designated the "studio issue," challenging the basic qualifications of that applicant. The issue having been posed, as it was required to be, it had to be disposed of in accordance with the Commission's rules. All parties were on notice that this issue was vital to a determination of the case. Only if Television Broadcasters proved that a waiver was justified, could the Commission properly grant the waiver and consider its application on a comparative basis.

It is well established that the failure of a party to carry its burden of proof with respect to any designated issue will result in a denial of that party's application. A fortiori, where a designated issue presents a threshold question to determine whether an applicant qualifies, the failure to meet it leads to disqualification. *Colonial Television, Inc.* v. *Federal Communications Commission*, 217 F. 2d 21 (D.C. Cir. 1954); *Robert E.*

Bollinger, 13 Pike & Fischer RR 881 (1957). Furthermore, if Television Broadcasters failed in the course of the hearing to justify a waiver of the rules, its application, being in violation of the rules, would not be entitled to comparative consideration. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Simmons* v. *Federal Communications Commission*, 145 F. 2d 578 (D.C. Cir. 1944); *The Yankee Network, Inc.*, 4 Pike & Fischer RR 412a (1948).

The hearing is the product of the hearing order. With this order in mind the parties prepare their cases. Decisions are made as to the evidence to be presented, the objections to be made, and the arguments to be urged, all in the belief that the agency will make its choice upon the grounds it has announced. Here, the studio issue was not merely a weakness in Television Broadcasters' proposal, it was a fatal defect. Brown consistently urged disqualification of Television Broadcasters for failure to meet the studio issue throughout the hearing, and argued and briefed this point to both the Examiner and the Commission. Brown had no reason to believe, and did not believe, that the issue would be, or could be, ignored.

However, the issue was ignored and the award was made despite the failure of Television Broadcasters to meet the issue. The court has permitted an agency to use the hearing order, not as an aid to the parties, but as a means of misleading them. The agency cannot require an applicant to comply with a rule as a condition precedent to being found qualified, and then fail to admit the consequences of its act when the requirement is not met. It is fundamental that an administrative proceeding is unfair when the parties are not

apprised of the issues to be determined. See *Morgan* v. *United States*, 304 U.S. 1 (1937)[23] The result is the same when the parties are misled as to the issues.

The holding of the Fifth Circuit Court of Appeals in *Trunkline Gas Co.* v. *Federal Power Commission*, *supra*, is in direct conflict with the decision in this case. In *Trunkline* "the question . . . [was] whether the Federal Power Commission, *having ordered a full hearing* into a phase of a Natural Gas Company's rate, can ignore the Examiner's findings favorable to the Company and adverse to the Staff's contention by retrospectively limiting the issues." 247 F. 2d at 159-60. [Emphasis added] The Court of Appeals for the Fifth Circuit held "that any such action is an abuse of the administrative process and that the Commission may not do it." *Id.* at 160.

The relevant circumstances of the *Trunkline* case are strikingly parallel to the instant case. There, as here, the Commission issued an order instituting the hearing and establishing the issues. There, as here, an evidentiary hearing was held, "and on that evidence, on those issues, the Examiner held generally in favor of Trunkline." *Id.* at 162. There, as here, the Commission reversed the Examiner, brushing aside pertinent evidence, and limited its decision to but one aspect of the issues.

The court ruled that the Commission may not "change the rules in the middle of the game . . .", noting

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[23] When the converse to the present situation was presented, the Court of Appeals for the District of Columbia Circuit had no difficulty in applying this principle. Thus, in *Plains Radio Broadcasting Company* v. *Federal Communications Commission*, 175 F. 2d 359 (D.C. Cir. 1949), the court reversed the Commission for deciding a case on issues which had *not* been included in the hearing order, and which had *not* been heard.

that the hearing order ". . . in the simplest and most direct words charted the course of this proceeding. It was in no sense limited to [the one issue]." *Id.* at 164. "The result," the Court stated, "is that the Commission must adjudicate this matter within the full framework fashioned by it." *Ibid.*

B. The Commission's Disposition of the Studio Issue Was Improper Because It Was Not in Accordance With Its Rules and Regulations.

In the *Trunkline* case, the court held that the failure to follow the hearing order alone unduly prejudiced the party to the Power Commission proceeding. In the instant case, an even more flagrant disregard of established procedures was upheld by the Court of Appeals. Petitioner was relying not only on the hearing order but on procedures and rights specifically provided in the Communications Act and the Rules of the Commission. Thus, (1) the Act directs the Commission to designate an issue if an applicant's basic qualifications are in question;[24] (2) the Order setting forth the issues must be published in the Federal Register;[25] (3) the Commission's rules require each applicant to state formally to the Commission that they will appear and present evidence upon the issues which are set forth in the Commission's order;[26] (4) motions to enlarge or delete issues must be addressed to the Commission within fifteen days after the order of designation for hearing;[27] (5) the Hearing Examiner has no power to depart from the issues or to modify them in any

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[24] § 309(e) of the Communications Act of 1934, as amended, 74 Stat. 889 (1960), 47 U.S.C. § 309(e) (Supp. II, 1961).

[25] Rule 1.140(a), 47 C.F.R. § 1.140(a).

[26] Rule 1.140(c), 47 C.F.R. § 1.140(c).

[27] Rule 1.141(b), 47 C.F.R. § 1.141(b).

way;[28] (6) evidence offered at the hearing will be excluded as irrelevant if it is not related to an issue;[29] and (7) the Commission is required to make findings upon all of the issues designated.[30]

Moreover, the Commission's disposition of the studio issue was, by itself, a direct violation of its own rules. This was an issue with which the Commission had no discretion. Its rules required that this be included in the hearing as a threshold issue. There is no dispute that Television Broadcasters did not carry its burden on this qualifying issue. Therefore, the Commission, in compliance with its rules should not have considered Television Broadcasters' application. Yet, when apprised that a waiver of its rules could not legally be granted, the Commission simply ignored the studio issue, awarded the permit to Television Broadcasters, and authorized a post-grant amendment in an effort to eliminate the issue.[31]

The result is that the award was made to an unqualified applicant, and the Commission ignored its own rules, as well as the hearing order, in making the award. This kind of arbitrary and *ad hoc* action on the part

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[28] Rule 1.141(b), 47 C.F.R. § 1.141(b); *Times-World Corp.*, 9 Pike & Fischer RR 1145e (1953).

[29] *McM Broadcasting Co.*, 20 Pike & Fischer RR 183 (1960).

[30] § 309(e) of the Communications Act of 1934, as amended, 74 Stat. 889 (1960), 47 U.S.C. § 309(e) (Supp. II, 1961); § 8 of the Administrative Procedure Act, 10 Stat. 243 (1946), 5 U.S.C. § 1008.

[31] If the Commission were going to allow the amendment, obviously a competing party would prefer to have it done during the hearing when its case could be shaped to reflect this new development. There is no recourse when the change is made after the hearing.

of an administrative agency has been uniformly condemned. An agency must follow its own rules. *Service* v. *Dulles*, 354 U.S. 363 (1957); *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955). Exceptions to this basic principle should not be allowed. Particularly should they not be allowed at the expense of a party to a hearing who has relied upon the hearing order and the agency's regulations and who has depended upon the axiom that an agency is bound by its rules.

C. The Court of Appeals Erroneously Ruled That Petitioner Was Not Prejudiced by the Commission's Error.

Despite the fact that the Commission violated its own rules and failed to base its decision on the designated issues and the record of the hearing, the majority of the court below has ruled that the error of the Commission did not prejudice the petitioner's rights and therefore was harmless. This holding of the majority either misconceives or disregards the rights of a party to an administrative hearing. It establishes a precedent which could seriously affect the rights of all parties to an administrative hearing.

What were the rights of the petitioner in this proceeding? The petitioner was found by the Commission to be a qualified applicant. As such, the petitioner had a right to have its application granted unless another qualified applicant should prove to be superior in open hearing. Petitioner also had a right to rely on the hearing order as correctly setting forth the Commission's appraisal of the qualifications or lack thereof of the competing applicants. Petitioner had a right to shape its evidence and conduct at the hearing on the basis of the issues designated in the hearing order.

Petitioner had a right to rely on the Commission to enter a decision on the basis of the designated issues. Petitioner had a right to have the Commission's rules and regulations applied to the competing application of Television Broadcasters. Petitioner had a right to have the facts and issues it raised in its timely petition for rehearing considered and decided by the Commission. Petitioner had a right to have Television Broadcasters' application denied when its grant could be sustained only on the basis of an invalid waiver of the rules.

The foregoing are the rights of any party to an administrative hearing. They were the rights of the petitioner. They are the rights that have been denied the petitioner because of the Commission's error.[32]

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[32] The Court of Appeals for the District of Columbia Circuit has previously ruled that the failure of the Commission to observe statutory procedure was in and of itself prejudicial. Thus, in *Channel 16 of Rhode Island* v. *Federal Communications Commission*, 229 F. 2d 520, 524 (D.C. Cir. 1956) the court said:

> "Because of this failure of the Commission to observe statutory procedure, it is necessary for us to hold its action in this case unlawful and to set it aside for that reason alone,[4] without reaching the other reasons for reversal advanced by appellant. In so doing we have taken due account of the rule of prejudicial error, as we are admonished to do by the statute quoted in the margin. The Commission itself noted 'that serious questions have been raised concerning the Commission's action in granting said authorizations.' In the resolution of those questions, Channel 16 and indeed all the parties were entitled to participate in a full hearing of the nature prescribed by law. They were not allowed to do so."

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[4] The Administrative Procedure Act, 5 U.S.C.A. § 1009(e), provides that:

> "* * * [T]he reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * without observance of procedure required by law * * *. In making the foregoing determinations * * * due account shall be taken of the rule of prejudicial error." [Footnote in original]

The Court of Appeals based its holding that there was no prejudicial error on its belief that Brown had acquiesced in the understanding that Television Broadcasters' studio site would be treated as available even though it was not, in fact, available. Thus, the Court reasoned, Brown could not be prejudiced when it became evident that the site was actually unavailable.

This reasoning is erroneous on several grounds. Principally, it fails to take account of the fact that the question at issue was not the availability of the site but existence of good cause for waiving the Commission's rule in order to permit the use of a proposed site which did not conform to that rule. The mere fact that the proposed site is available is no justification for a waiver of the rule and the Commission, in its original decision, did not rely on this fact in granting a waiver.[33] Nor did the Commission concern itself with whether or not Brown had acquiesced in an understanding that the site would be treated as available.[34] In fact, the

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[33] Of course, if a proposed site is unavailable this fact becomes material for it would be futile to grant a waiver for an unavailable site. When, after the Commission's original decision, Brown obtained evidence that Television Broadcasters had not taken steps to insure the availability of its proposed site, and that the site was actually unavailable, it brought this evidence to the attention of the Commission as an additional reason for invalidating the waiver.

[34] Brown, in its Petition for Rehearing, disputed the court's finding that it had acquiesced in an understanding that the site should be treated as available. Indeed, Brown's acquiescence or non-acquiescence is immaterial to the proper resolution of the studio issue. The Rules of the Commission required that the issue be included in the hearing. The statute placed the burden of proof as to the issue on Television Broadcasters. [§ 309(e) of the Communications Act of 1934, as amended, 74 Stat. 889 (1960), 47 U.S.C. § 309(e)] The conduct of a competing party could not relieve Television Broadcasters from this statutory burden nor exempt the Commission from the requirement that it follow its own rules.

Commission based its waiver on the "facts" (1) that there was an existing studio on the proposed site for which a waiver had previously been granted and (2) that unless the waiver were granted the sums expended in building the studio would be wasted. These "facts" simply were not true. The grant of a waiver for which they formed a basis was, therefore, clearly invalid.

In holding that the Commission's error was harmless, the court also relied on the Commission's treatment of the studio issue as a comparative rather than a qualifying issue. In this treatment, both the court and the Commission erred. They reasoned that Television Broadcasters had received no comparative advantage because of its studio proposal and, therefore, Brown was not prejudiced. However, the studio issue was not a comparative issue. By the terms of the statute and the Rules of the Commission it was a threshold issue which Television Broadcasters had to meet to obtain comparative consideration. The Commission had no discretion to alter the nature of the issue in an attempt to defend its grant.[35] Consideration of Television Broadcasters, an unqualified applicant, on a comparative basis with Brown, a qualified applicant, was prejudicial to Brown. The court's holding failed to recognize this prejudice.

In summary, the petitioner participated in an evidentiary hearing which was governed by the Commission's hearing order. Because the Rules of the Commission dictated it, this order specified a threshold issue

[35] It is not the first time that the Commission, "[H]owever unwittingly, . . . seems to have assumed the defense of its grant, rather than the public interest, as its primary role in the proceedings." *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 511, 515 (D.C. Cir. 1955).

with respect to the competing applicant, Television Broadcasters. The issue was not met, and yet the Commission awarded the grant to Television Broadcasters by ignoring the disqualifying nature of the issue. This course of action by the Commission deprived Brown of the due process to which it was entitled. The failure of the Court of Appeals to recognize the consequent prejudice to petitioner raises an important issue involving administrative procedure which calls for the exercise of this Court's power of supervision.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRONEOUSLY PLACED A SERIOUS LIMITATION ON THE RIGHT OF APPEAL GRANTED BY THE COMMUNICATIONS ACT.

As discussed in the preceding section, the Court of Appeals failed to recognize that the Commission's course of action in this case seriously prejudiced petitioner's right to due process of law. Protection of this right to due process is important not only to petitioner, but also of the utmost public interest. Any denial of a basic right undermines the entire Constitutional system which is predicated on the protection of those rights. Public faith and confidence in the administrative process and in the judicial system cannot be maintained if courts permit agencies to ignore their own rules and hearing orders.

Each administrative agency is charged with the protection of a designated area of the public interest. The purpose of its rules and regulations and its established procedures should properly be the promotion of and service to that part of the public interest committed to its care. A violation of those rules is by its very nature inimical to the public interest.

Especially is this so where the agency, itself, violates its rules by applying them to some and ignoring them for others. These circumstances can produce only administrative chaos and consequent injury to the interest of the public. The courts should, in such situations, protect the public interest by requiring the agency to treat all parties alike under its rules.

The public is certainly entitled to fair administrative adjudication of applications for permits to use the Nation's airwaves. This is the basis of the statutory requirement that the Federal Communications Commission "specify with particularity the matters and things in issue." Yet no lawyer can properly represent a client before the agency unless he can rely not only on the issues being specified with particularity, but also on the rules being followed. The advocate cannot properly fulfill his role if he must guess which rules are to govern, to whom they will be applied, and when they may be successfully ignored.

It would seem clear that the Commission's failure to decide this case on the basis of its own hearing order and in accordance with its rules was a sufficient abuse of due process to be of public concern and injury. For this reason, the propriety of the Commission's decision of the studio issue was properly before the Court of Appeals even if it be assumed that the court correctly held that a showing of public injury is a prerequisite to judicial review. However, it is submitted that the court was in error in holding that public injury was a necessary prerequisite to review of the Commission's procedural error. (Appendix A, pp. 4a-5a).

In concluding that public injury was required on appeal under Section 402(b)(1), the court relied on

the decisions of this Court in the *Scripps-Howard*[36] and *Sanders*[37] cases, both of which dealt with appeals under Section 402(b)(6) of the Act.[38] The difference in the provisions of the two sections is clear and unmistakable. Section 402(b)(1), under which the instant appeal was taken, grants the right of appeal to "any applicant for a construction permit or station license, whose application is denied by the Commission."

Section 402(b)(6) however, does not deal with appeals by parties or applicants, it extends the right of appeal to "any . . . person [not a party or an applicant] who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application. . . ."

There can be no question that in the instant case the Commission's failure to follow its hearing order is a procedural error, and this error ran against petitioner, "an applicant for a construction permit . . . whose application is denied by the Commission." Thus petitioner's appeal on the studio issue is squarely within the appropriate section of the Act.

Moreover, the Communications Act itself clearly establishes the right to review of procedural errors. Subparagraphs (1) through (8) of § 402(b) grant the right of appeal to certain classes of persons affected by

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[36] *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4 (1942).

[37] *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

[38] 66 Stat. 718 (1952), 47 U.S.C. § 402(b)(6). At the time of the *Scripps-Howard* and *Sanders* cases the identical provision was contained in then Section 402(b)(2) of the Act. 48 Stat. 1093 (1934).

Commission actions. Section 402(g) requires the Court to hear and determine the appeal in the manner prescribed by § 10(e) of the Administrative Procedure Act.[39] Section 10(e) directs the court to "decide all relevant questions of law." It states that the court shall "hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law . . . ." This is clear statutory direction that procedural errors of the Commission are subject to review and reversal.

The *Sanders* case, *supra* (and those cases following it), does not impose any limitation on this right to review of procedural errors. These cases arise under § 402(b)(6). As discussed above, that section extends the right of appeal to "any person [other than a party or applicant] who is aggrieved or whose interest is adversely affected" by the Commission's grants of licenses and construction permits. The *Sanders* case holds that a private injury, such as economic harm, gives a person standing to appeal under § 402(b)(6). In that case, the Court rejected the argument that the same economic harm which gives standing to appeal is also grounds for reversing the Commission's decision, stating that injury to the public interest must be shown to justify reversal. The Court was making clear that in giving standing to appeal, the statute was not adding new grounds on which the Commission's action might be upset.

Procedural error by the Commission is a ground for reversal clearly established by the statute, however. In fact, in the same term of Court in which the *Sanders* case was decided, the Court clearly held that Commission procedures must protect both private and public

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[39] 60 Stat. 243 (1946), 5 U.S.C. § 1009(e).

interests. In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940), the Court stated:

> "Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked . . . were explicitly and by implication left to the Commission's own devising, *so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest.*" [Emphasis supplied]

If the Commission failed to satisfy these basic requirements, the only recourse is to judicial review. For this reason, there is no ground for holding that the discussion of public interest in *Sanders* was meant to limit the scope of the right of review in those cases in which the Commission's procedure failed to protect the parties.

It is clear, therefore, that the Court of Appeals improperly failed to review the propriety of the Commission's determination of the studio issue. Since the Court of Appeals for the District of Columbia Circuit is the only court empowered to hear appeals under Section 402(b) of the Communications Act, the restriction it has here imposed is particularly conclusive and far reaching. By granting certiorari in this case, this Court can eliminate the serious limitations erroneously imposed by the court on the right of appeal under the Communications Act.

CONCLUSION

The exercise of this Court's power of supervision is needed to settle definitively the issues of due process which this case presents. If an agency is to be permitted to decide matters without regard to the issues

designated in its hearing order, or if exceptions are to be allowed to the principle that an agency must follow its own rules, this Court should establish the guide lines. Otherwise administrative chaos will result and the parties to a proceeding will be left to the whim of the agency.

Furthermore, the Court should determine whether the Court of Appeals has improperly limited the scope of review under § 402(b)(1) of the Communications Act.

Respectfully submitted,

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September 12, 1961

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,644

BROWN TELECASTERS, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

TELEVISION BROADCASTERS, INC., *Intervenor*

On Appeal from an Order of the Federal Communications Commission

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Decided February 16, 1961

Before EDGERTON, WASHINGTON and DANAHER, Circuit Judges.

WASHINGTON, *Circuit Judge:* This case arises upon an appeal from an order of the Federal Communications Commission awarding a construction permit for a commercial VHF television station on Channel 12 in Beaumont, Texas, to Television Broadcasters, Inc., and denying the mutually exclusive application of Brown Telecasters, Inc., appellant here.

The main issue argued to us relates to the location of the studio of the successful applicant. Section 3.613(a)[1] of the Rules of the Federal Communications Commission provides, in part, "The main studio of a television broadcast station shall be located in the principal community to be served." Subsection (b) permits waiver of this

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[1] 47 C.F.R. § 3.613 (1958).

requirement upon a showing of "good cause." In its original application, Television Broadcasters, the successful applicant, proposed a studio site not within the city limits of Beaumont, the principal city to be served. The Commission found that "good cause exists for waiver of the Rule, and that Television Broadcasters, despite urging of threshold disqualification, is entitled to comparative consideration." After weighing the evidence before it, the Commission entered an order awarding the permit to Television Broadcasters.

Appellant thereupon petitioned the Commission for reconsideration and rehearing. By attached exhibits appellant sought to establish that the studio site proposed by Television Broadcasters was not available to it and that Television Broadcasters had been guilty of misrepresenting to the Commission that the site was available, knowing that in fact it was not. An affidavit attached to the opposition to appellant's petition admitted that the originally proposed site had been destroyed, and was no longer owned by Television Broadcasters. It added that it was not Television Broadcasters' intention at that time to repurchase the old site, in view of the high price being asked by the new owner. Instead, the reply stated, Television Broadcasters would apply for a modification of its construction permit to specify a new site within the city limits of Beaumont. The Commission, in its opinion reaffirming the grant, alluded to the proposed modification, indicated its reliance upon it, and stated that an application designating a new site within the city would be favorably treated.[2] Subsequently, such an application was made and granted. In the meantime, appellant had taken this appeal.

Appellant's principal contention here is that the Commission's finding that "good cause" existed to warrant

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[2] The Commission added "In the event that future developments should prove this unwarranted, the Commission would, of course, re-evaluate the modified TB [Television Broadcasters] proposal."

waiving compliance with the "studio rule" on Television Broadcasters' original application is unsupported and, in fact, contradicted by the record. A remand is sought, directing the Commission to make findings with respect to the allegations set forth in appellant's petition for reconsideration.

While there exists the possibility that the Commission erred in granting the waiver here at issue, it appears to us that appellant has not suffered such prejudice as would entitle it to relief. Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e) (1958), requires a reviewing court to take "due account . . . of the rule of prejudicial error."[3] Brown's conduct in the proceedings below negates its present claim of prejudice. As early as November 1, 1957, Television Broadcasters petitioned for leave to amend its application to specify a different studio site within the city limits of Beaumont. Although Television Broadcasters expressly disclaimed any intent to seek a preference on the basis of the change, Brown opposed the petition. At the hearing on the proposed amendment, on December 16, 1957, counsel for Television Broadcasters stated that the change "was occasioned principally by the fact that a creditor of Television Broadcasters began proceedings to have the site which Television Broadcasters owned outside of [Beaumont] . . . seized and sold in satisfaction of a debt. . . . And it so happened that, about October 1, about a month before the amendment was finally filed, some space became available in a building owned by Mr. Reed, and it was to that building which the studio site was changed." The request to move the studio was ultimately denied by the examiner.

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[3] To quote the Attorney General's Manual on the Administrative Procedure Act (1947), at p. 110: ". . . errors which have no substantial bearing on the ultimate rights of the parties will be disregarded. *Market Street Ry.* v. *Comm'n*, 324 U.S. 548, 561-2 (1945)."

Subsequently, in the course of a prehearing conference held on March 3, 1958, the Hearing Officer ruled, without objection from Brown: "There is no legal question of availability. There has been a lot of talk in prehearing and in the hearing as to the [sheriff's] sale and so on, but it would have to be ignored, because it is not evidence. So far as I am concerned, you [Television Broadcasters] still have your old site."

Oral argument upon exceptions to the initial decision of the Hearing Examiner in favor of Brown was had before the Commission on July 10, 1959. The action of the Examiner in holding improper the waiver of the "studio rule" was defended by counsel for Brown, not upon the ground that Television Broadcasters' proposed site was unavailable, but solely upon the ground that it was unsatisfactory: ". . . the only evidence in the record about this studio is that it is unsatisfactory." It was only after the Hearing Examiner had been reversed on the acceptability of the site by the Commission, that Brown first asserted its unavailability, some two years after the matter had been raised in the proceedings. Brown's continued acquiescence in the understanding that the initial studio would be treated as available is palpably inconsistent with any notion of prejudice, in view of what the record shows it must have known.

It is conceded that Television Broadcasters received no comparative advantage because of its original studio proposal; the Commission described it as a "comparative *deficiency* which was overcome by the over-all merit of its application." (Emphasis supplied.) Nor do we find any public injury present here, especially in view of the fact that Television Broadcasters has secured Commission approval of a new studio site within the city limits, for which a waiver of the "studio rule" is unnecessary. This court may not properly remand a case to the Commission when no public end can be served thereby. "The Com-

munications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By § 402(b)(2) Congress gave the right of appeal to persons 'aggrieved or whose interests are adversely affected' by Commission action. 48 Stat. 1064, 1093. But these private litigants have standing only as representatives of the public interest. *Federal Communications Commission* v. *Sanders Radio Station*, 309 U.S. 470, 477." *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 14 (1942). We find nothing in the language of the Act which would provide a different standard for appeals grounded, as this one is, upon Section 402(b)(1).[4] Accordingly, we are of the view that we may not disturb the Commission's determination of the "studio issue," since the propriety of that decision is not properly before us.

Appellant also attacks as arbitrary and without foundation the Commission's comparative determination in favor of Television Broadcasters. We are of the opinion that this decision has ample support in the record and must be sustained. In particular, the implications to be drawn from the conduct of Television Broadcasters' UHF operation, and the comparative experience of the applicants, are, we believe, matters peculiarly within the province of the Commission. We find no evidence of such administrative arbitrariness as would warrant judicial intrusion.

A further point raised by appellant is that the Commission erred in failing to find that Television Broadcasters had been guilty of misrepresentations concerning its studio proposal. The Commission considered the evidence offered by appellant on this point and found the objection to be without merit. We agree.

Affirmed.

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[4] 47 U.S.C. § 402(b)(1) (1958).

DANAHER, *Circuit Judge*, dissenting: Certain propositions are elementary and may be simply stated. The Act authorizes a grant of a construction permit only upon a written sworn application which shall set forth such facts as the Commission may by regulation prescribe as essential to an exercise of its judgment. The Commission's Rules require that each application shall contain full and complete disclosure as to such matters. Defective applications, patently not in accordance with the Rules will be dismissed unless accompanied by a request for waiver of, or exception to, an applicable rule.

One such rule[1] provides that the "main studio of a television broadcast station shall be located in the principal community to be served," a provision which may be waived for "good cause."

Various applicants filed mutually exclusive applications for Channel 12, Beaumont-Port Arthur, Texas. All having been found "formally" qualified, a consolidated hearing was ordered, but the Commission itself as of August 8, 1957, designated as an issue as to the intervenor "whether good cause exists for a waiver of Section 3.613 (a) of the Rules with respect to the main studio proposed by Television Broadcasters, Inc."

Before the Examiner, Bureau counsel pointed out the possibility of a change in the comparative picture because of the studio issue and that "it certainly is questionable whether at this late stage[2] Television Broadcasters should be allowed to move their studio into town." The Examiner noted that the "record contains grave implications of [Television Broadcasters'] early foreknowledge of the possible

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[1] 47 C.F.R. § 3.613(a) (1958).

[2] The Examiner deemed it established of record that the chief reason for Television Broadcasters' proposed studio change was not to achieve conformance with the Rule, *supra* note 1, but because the site was unavailable.

unavailability (or non-use) of the studio specified in the application." The Examiner denied at that stage, February 19, 1958, the intervenor's petition to amend to specify a new studio location within the City of Beaumont. The hearing went forward, and as of August 11, 1958, the Examiner recommended an award to Brown Telecasters, Inc.

The Commission, three members absent, as of November 6, 1959 reversed the Examiner. The Commission as to the studio issue noted:

> "The studio in question is already in existence and was the one used by Television Broadcasters in its UHF operation, and for which a waiver of the rule, with respect to the UHF operation, has already been granted. . . . The feasibility of the site has been demonstrated by its use as a UHF studio. If we were to require compliance with the rule as a condition to a VHF grant the sums expended by the applicant in constructing the studio pursuant to a waiver of the rule, would be largely wasted. Under the circumstances we believe good cause exists for waiver of the Rule, and that Television Broadcasters, despite urging of threshold disqualification, is entitled to comparative consideration."

Surely the Commission could not have relied upon the earlier waiver as to the UHF use of an out-of-town site in view of its having, *sua sponte*, designated the studio site issue. Once the issue was presented, we find the Commission talking about and purporting to approve the out-of-town site when the one Television Broadcasters intended to use was in town. Now we would be persuaded that it makes no difference, not in terms of a post-grant improvement of an applicant's position, but in terms of a post-award disregard of an initial disqualification. Yet the Examiner had been led to the position that criticisms by two other applicants became irrelevant because the Commis-

sion at the outset had found Television Broadcasters to be legally, financially and "technically qualified."[3]

The whole course of the hearing was necessarily altered. Costs involved in readying and reconstructing, as well as in program production[4] in, a new in-town site surely were critical to the financially beleaguered applicant. Competing applicants, however, had to deal with the case in the posture then presented before the Examiner. Public convenience and necessity stressed by my colleagues might be served, no matter which of the applicants might prevail, indeed Brown was recommended by the Examiner. But the due process to which Brown was entitled was ultimately denied because of what the Commission did. Clearly, to my mind and as I shall demonstrate, it was the error of the Commission which has left the record in the form which my colleagues find acceptable.

Obviously the Commission recognized that either an applicant must comply with the rule or the Commission must find that good cause exists for non-compliance. It follows that, absent compliance or a proper finding of a waiver, the applicant is not qualified. The Commission's rules and regulations following the statute permit no other conclusion.

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[3] The Examiner additionally noted:

"It is apparent that Television Broadcasters has not met its burden of proof. To adopt the argument of Television Broadcasters would be to hold that the Commission has requested the applicant to do a futile, unnecessary thing in meeting the burden. That interpretation would be unthinkable, stultifying. The imagination does not need to run rampant to pose many different and valid reasons as to why an applicant, possessing a waiver for the studio location in a sometime one-station market (and that, UHF) should be required to 'prove up' such a waiver in a competitive VHF situation."

[4] The Examiner noted that none of the parties had "put any money figures into the record to support their views."

Here the grounds set forth by the Commission simply are not so. Moreover the Commission is talking in terms of waiver as to an out-of-town site when the award actually involves a completely different location. Down to this minute, the record wholly fails to establish a studio proposal by Television Broadcasters. Comparative consideration of sites is not at all a determining factor here, we may agree, but because of the hiatus, rulings on other aspects of proof necessarily controlled the course of the hearing. Therein lay the vice, once the Examiner had denied Television Broadcasters' proffered amendment to show a changed studio site. The contestants were thus in controversy as to other comparative factors, so presenting to the Commission a very different record than should otherwise have been the case. Yet the Commission simply reaches back into the record, such as it is, then purports to find qualification where there was failure, and even in doing so is factually wide of the mark.

For example, the site specified by Television Broadcasters was not within the city. Some years earlier, it had been used by KTBMT to be sure, but the intervenor's affidavit of February 4, 1958 filed with the Examiner showed that since collapse of the UHF operation, the studio site "had been so ransacked and burglarized due to lack of use, that it would have cost several thousand dollars to repair, and allowance for which had been made in our original cost estimates."

The property had already been sold at a sheriff's sale on November 5, 1957, to satisfy a judgment against Television Broadcasters. Nothing remained of the building but the concrete floor and outer walls. "Even the roof, all wiring and plumbing connections had been removed," said Television Broadcasters' Mr. Reed's affidavit of December 28, 1959.

But the Commission finds "good cause" in that the nonexistent studio "is already in existence;" the "feasibility

of the site has been demonstrated," but the "feasibility" so found in 1952 for a UHF station related to a completely different site from that actually to be used; and if "we were to require compliance with the rule . . . the sums expended [previously] by the applicant . . . would be largely wasted;" yet they already had been.

The Commission, like any other agency, should be bound by its own rules. I think the error glares.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 15,644

BROWN TELECASTERS, INC., *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

TELEVISION BROADCASTERS, INC., *Intervenor.*

Before: WILBUR K. MILLER, *Chief Judge,* EDGERTON, PRETTYMAN, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN, and BURGER, *Circuit Judges,* in Chambers.

Upon consideration of the petition for rehearing en banc, it is

ORDERED by the Court that the petition for rehearing en banc is denied.

Per Curiam.

Dated: June 12, 1961

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 15,644

BROWN TELECASTERS, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,

TELEVISION BROADCASTERS, INC., *Intervenor*.

Before: EDGERTON, WASHINGTON and DANAHER, *Circuit Judges*, in Chambers.

Order

Upon consideration of the petition for rehearing before this division, it is

ORDERED by the Court that the petition for rehearing before this division is denied.

Per Curiam.

Dated: June 14, 1961

EDGERTON and WASHINGTON, *Circuit Judges:* The majority opinion of the court filed February 16, 1961, contains the following statement:

> "Brown's continued acquiescence in the understanding that the initial studio would be treated as available is palpably inconsistent with any notion of prejudice, in view of what the record shows it must have known."

In its petition for rehearing, Brown challenges the accuracy of this statement on the theory that it "did not learn until after the Commission's first decision that Television Broadcasters had not taken steps to assure the availability of the [initial] site." We have reexamined the record and are satisfied that Brown knew, at an early stage in the proceedings, that Television Broadcasters had lost the initial site. What Brown knew or did not know about any efforts to retrieve the site is immaterial.

Judge Danaher adheres to his dissent and would grant the petition.

APPENDIX B

TITLE 47 U.S.C.

§ 309. Application for license.

(a) Considerations in granting application.

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * * *

(e) Hearings; intervention; evidence; burden of proof.

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties

in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

§ 402. Judicial review of Commission's orders and decisions.

* * * * *

(b) Right to appeal.

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the

Commission granting or denying any application described in paragraphs (1)—(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

* * * * *

(g) Time of hearing; procedure.

At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 1009 (e) of Title 5.

TITLE 5 U.S.C.

§ 1007. Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record.

In the cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

(a) In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 1004 of this title, any other officer or officers qualified to preside at hearings pursuant to section 1006 of this title) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency

makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

§ 1009. Judicial review of agency action.

* * * * *

(e) Scope of review.

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold

unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

TITLE 47 C.F.R.

Hearings and Decisions.

§ 1.140. Procedure when an application is designated for hearing.

(a) When an application has been designated for hearing, the Secretary of the Commission will mail an order to the applicant setting forth the reasons for the Commission's action and the issues upon which the application will be heard. In addition, the notice of hearing will be published in the Federal Register. The Commission will, when possible, give at least 60 days advance notice on comparative hearings.

(b) Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues,

shall be upon the applicant except as otherwise provided in the order of designation.

(c) In order to avail himself of the opportunity to be heard, the applicant, in person or by his attorney, shall, within 20 days of the mailing of the notice of designation for hearing by the Secretary, file with the Commission, in triplicate, a written appearance stating that he will appear on the date fixed for hearing, and present evidence on the issues specified in the order. Where an applicant fails to file such a written appearance within the time specified, or has not filed prior to the expiration of that time period a petition to dismiss without prejudice, or a petition to accept, for good cause shown, such written appearance beyond expiration of said 20 days the application will be dismissed with prejudice by the Chief Hearing Examiner for failure to prosecute.

(d) The Commission will on its own motion name as parties to the hearing any person found to be a party in interest.

(e) In order to avail himself of the opportunity to be heard, any person named as a party pursuant to paragraph (d) of this section shall, within 20 days of the mailing of the notice of his designation as a party, file with the Commission, in person or by attorney, a written appearance in triplicate, stating that he will appear and present evidence on the issues specified in the notice of hearing. Any person so named who fails to file this written statement within the time specified, shall, unless good cause for such failure is shown, forfeit his hearing rights.

§ 1.141. Motions to enlarge, change, or delete issues.

Motion to enlarge, change, or delete the issues may be filed by any party to a hearing. Such motions must be filed with the Commission not later than 15 days after the issues in the hearing have first been published in the Fed-

eral Register. Any person desiring to file a motion to enlarge, change, or delete the issues, after the expiration of such 15 days must set forth the reason why it was not possible to file the petition within the prescribed 15 days. Unless good cause is shown for delay in filing, the motion will not be granted.

§ 1.311. Amendments of applications.

(a) Any application may be amended as a matter of right prior to the adoption date of the order designating such application for hearing merely by filing the appropriate number of copies of the amendments in question duly executed in accordance with § 1.303.

(b) Requests to amend an application after it has been designated for hearing will be considered only upon written petition properly served upon the parties of record, and will be granted only for good cause shown. If the granting of such petition would permit a grant of the amended application or an application theretofore in conflict with the amended application, such petition must be accompanied by an affidavit as to whether or not consideration has been promised to or received by petitioner, directly or indirectly, in connection with the filing of such petition for amendment. If such consideration has been promised or received, the affidavit shall set forth in full detail all the relevant facts. The affidavit of consideration shall be executed by:

(1) The applicant, if an individual;

(2) A partner of applicant, if a partnership; or

(3) An officer of applicant having personal knowledge of the facts, if a corporation or association.

§ 3.613. Main studio location.

(a) The main studio of a television broadcast station shall be located in the principal community to be served.

Where the principal community to be served is a city, town, village, or other political subdivision, the main studio shall be located within the corporate boundaries of such city, town, village or other political subdivision. Where the principal community to be served does not have specifically defined political boundaries, applications will be considered on a case-to-case basis in the light of the particular facts involved to determine whether the main studio is located within the principal community to be served.

(b) In cases where an adequate showing is made that there is good cause for locating a main studio outside the principal community to be served and that to do so would not be inconsistent with the operation of the station in the public interest, the Commission will permit the use of a main studio location other than that specified in paragraph (a) of this section. The licensee or permittee of a television broadcast station shall not move his main studio outside the principal community in which it is located without first securing a modification of construction permit or license. Such licensee or permittee shall notify the Commission promptly of any change of the location of the main studio within the community. In any case where the main studio is located outside the principal community to be served, the licensee or permittee of a television broadcast station shall not move his main studio without first securing a modification of construction permit or license.